Supreme Court, U.S.
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No. 98-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W. E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I. RESPONDENTS' RECUSAL CONTENTIONS EVADE THE CRUCIAL ISSUE OF JUDICIAL BIAS

Respondents' opposition brief ("Opp. Br.") contends that "a judge's opinions and comments, based on facts introduced during the course of proceedings, cannot be the basis of recusal." (Opp. Br. p. 19)

This contention misleads. The valuation placed on the case by the district judge was not "based on facts introduced during the course of the proceedings," as respondents contend, but was based upon a settlement figure was given to the judge in ex parte settlement discussions by counsel for the respondents on the eve of trial before an ounce of evidence had ever been heard by the jury. As shown in Mr. Lightfoot's affidavit in the Appendix to the Petition (95a, 96a ¶ 4), the "remittitur" figure of $75,000 subsequently used by the district judge was derived from the earlier ex parte discussion, not from the evidence subsequently produced at the trial which, as determined by the jury, warranted a verdict of $750,000. (Pet. 47a)

Mr. Lightfoot therefore concluded that the judge's remittitur figure "was intended to punish me for exercising my jury trial rights instead of clearing his docket by settling the case." (Pet. 97a-99a)

That the economic effect of his remittitur figure of $75,000 was essentially punitive and confiscatory of Mr. Lightfoot's legitimate age discrimination claim was known to the district judge. Mr. Lightfoot had previously told him that at such figure he would be "a substantial loser," considering what he had to invest in the case in attorney's fees in light of the extended pre-trial proceedings. (Pet. 100a)

A statutory "tort reform" used to control excessive verdicts, the remittitur procedure in the instant case was perverted into an economic penalty. Violation of Seventh Amendment jury trial rights resulted.

Such a confiscatory result is wholly inconsistent with the remedial purposes of the age discrimination laws. Instead of providing a remedy for the unlawful acts of age discrimination that the jury found to have occurred, the remittitur figure established by the judge was knowingly used to punish the victim of the unlawful acts, and to allow their perpetrator to escape from any deterrent economic effect.

Respondents' brief refers to the supposedly surprising evidence that had "slipped out" in the second trial that Mr. Lightfoot had been forced to expend $350,000 in legal expenses in pursuing a remedy for the injuries that he had suffered as a result of age discrimination. (Opp. Br. p. 7)

This evidence was no surprise to respondents' counsel, however. Such expenditures were the result of the heavy dose of litigation by attrition tactics to which Mr. Lightfoot had been subjected by that same counsel. From the pricey billing rates charged by their counsel and his various law firms, respondents certainly were aware that the legal expenditures that Mr. Lightfoot, their target, had necessarily incurred were modest in comparison, but they did not disclose this information.

The real shocker to the administration of justice presented by this litigation is that in light of the jury's finding that Mr. Lightfoot had been injured to the extent of $750,000, as a result of age discrimination, the district judge nevertheless imposed a remittitur figure of $75,000 that he knew would produce a serious economic loss for Mr. Lightfoot.

The central purpose of the ADEA is to provide a true remedy for victims of age discrimination by providing such "legal or equitable relief as will effectuate the purpose of this chapter...." 29 U.S.C. § 626(c)(1) (Pet. 109a)

Such a drastic interference with the jury's verdict to

produce a punitive economic effect results in a situation in which the judge's impartiality not only "could reasonably be questioned" (the standard requiring disqualification pursuant to 28 U.S.C. § 455(a) (Pet. 112a)), but also one in which the mandatory "bias or prejudice" provisions of 28 U.S.C. § 144 should have been triggered:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." (Emphasis added.)

Contrary to respondents' contention that the Second Circuit did not hold "that there was anything improper in the district court's remitting the verdict to $75,000" (Opp. Br. p. 5), the Second Circuit specifically held that the district court judge had violated Mr. Lightfoot's Seventh Amendment jury trial rights because the judge's remittitur order had even failed to satisfy the well-settled requirement of providing for the option of a new trial on damages. (Pet. 42a)

The district judge's attitude, expressed in a conference in the presence of Mr. Lightfoot, that "I don't want any more of your silliness as I found in your brief to the Second Circuit Court of Appeals" (Lightfoot Aff. ¶ 20; Jt. App. A 3203f, A 3298-9), is further evidence of "personal bias or prejudice." So curiously a hostile and unrepentant a statement, on the part of a district judge whose remittitur order had just been reversed as violative of Mr. Lightfoot's constitutional rights, is incompatible with the purpose of 28 U.S.C. § 144.

Review by this Court in the exercise of its supervisory responsibilities is requested to ensure that the safeguards provided

in 28 U.S.C. §§ 144 and 455 are effectively implemented in the instant case and also by the appellate courts in the various Circuits.

This is especially important because the remittitur procedure is confined to use in connection with verdicts considered to be too favorable to plaintiffs, yet for verdicts considered to be too favorable to defendants a similar counter-balance is not provided.

Equal protection problems are raised as a result, in addition to concerns that the remittitur procedure has been used as an outgrowth of judicial hostility to anti-discrimination litigation.

The existence of such pockets of judicial hostility is indicated by recent statistical data that have recently become available. Such data indicate an alarming decline in the reversal rate for employment discrimination cases compared with other appeals in the Second Circuit. See, Draft Report Of The Working Committees To The Second Circuit Task Force On Gender, Racial, and Ethnic Fairness in the Courts (June 5, 1997). (127a)

In 1996, the Second Circuit's reversal rate in employment cases was only one-half of what it was in all civil appeals. (127a)

The Second Circuit's reversal rate of 3.2% for employment discrimination cases, moreover, is far less than half the national average reversal rate of 9.8%. (127a)

According to the statistics, as the number of discrimination cases has increased, the judges' apparent distaste for such cases also has increased, resulting in reversal rates in the Second Circuit which have declined from 20.5% in 1991 to 3.7% in 1996. (127a)

The minimal reversal rate does not tell the whole story. As stated in the conclusion of the Preliminary Draft Report Of The Second Circuit Task Force On Gender, Racial, and Ethnic Fairness In The Courts, (June 10, 1997), at p. 91 (117a):

> "The Committees have reported receiving information, largely from lawyers, to the effect that some judges disfavor employment discrimination cases and therefore might be treating litigants in those cases less than evenhandedly. We view the existence of such a concern as worrisome."

The problem has attracted national attention. See Garland, "Courts Behaving Badly -- Task forces say some judges impatient with job bias cases," ABA Journal, November 1997, p. 30, which singles out Second Circuit judges for the comment that some apparently believe that employment discrimination cases are "too trivial for their attention."

Cause for concern is also supplied by anecdotal evidence involving employment discrimination cases obtained by the Second Circuit's Task Force as stated in its Report (115a).

When evidence of bias or prejudice in such a case by a particular judge, as is shown in Mr. Lightfoot's affidavits herein, greater scrutiny of the issue of judicial bias than is exhibited in the Second Circuit's unpublishable decision is necessary to implement the highly important safeguards for the exercise of appellate responsibilities intended by 28 U.S.C. §§ 144 and 455.

This is so particularly since the standard in 28 U.S.C. § 144 is a mandatory standard, not one involving judicial discretion, contrary to the conclusion of Lucille Carr, the Clerk who apparently was delegated to write the Second Circuit's unpublishable decision. (Pet. 6a)

II. THE CENTRAL REMEDIAL PURPOSE OF THE ADEA WAS NEGATED BY THE DECISIONS BELOW

The dominant purpose of the Age Discrimination in Employment Act ("ADEA") is to provide a remedy for age discrimination in employment. The net effect of the decisions below, however, was to negate such purpose. What was provided was not a "remedy" but its antithesis because Mr. Lightfoot's ADEA claim was dismissed not after trial, but before the trial took place, upon an improper determination of a motion for summary judgment.

Respondents' contention that the dispute below is factual in nature is the Achilles heel of their brief in opposition. (Opp. Br. p. 8) That the existence of disputed issues of fact makes a reversible error of the granting of a motion for summary judgment has long been settled by the decisions of this Court that require all facts and inferences to be viewed favorably to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

Here, the labeling of what was called "severance pay," accrued and earned over many years of prior service was the same thing as "wages lost" specified in the enforcement provisions of the Fair Labor Standards Act, 29 U.S.C. § 216 (Pet. 112a), involves just such a disputed fact issue. The inference that should have been drawn on the motion for summary judgment is that it was not the same.

Had such a disputed fact issue been properly viewed as precluding summary judgment, Mr. Lightfoot would have been entitled to claim double damages for willful violation of the Fair Labor Standards Act enforcement provision incorporated by the ADEA, 29 U.S.C. §§ 626, 216 (Pet. 112a), as well as recovery

of attorney's fees, 29 U.S.C. § 216, and a true remedy would have been provided accordingly.

The ADEA also provides that the court has jurisdiction to grant "such legal or equitable relief as may be appropriate...." 29 U.S.C. § 626(b) (Pet. 108a). Whether it was "appropriate" on summary judgment to eliminate the claim of Mr. Lightfoot for damages for lost front pay on the basis of the purported reinstatement letter, concocted by Union Carbide while the litigation was pending (Pet. 105a), warrants review because of it inconsistency with the standards previously established by this Court. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14 (1986). That the matter should have been treated as a disputed fact issue precluding summary judgment is indicated particularly in light of the testimony on the subject elicited from Dr. Stanley L. Portnow, M.D., by respondents' counsel in the second trial (A4032-A4033):

> "A. [Mr. Lightfoot] was so sick, he was so depressed, he was under such anguish that for him to go back to the lion's den, so to speak, would have been like impossible for anyone to do.
>
> "He discussed it with me, actually, at some point, I don't remember at which point, and my advice to him was that he had to do, he had to do what he thought was right for him to do and certainly not to do anything that would make him sicker, and I think he turned down the job on that basis.
>
> "Q. So the anguish from being let go by Union Carbide put him in a position where he wasn't in a position to accept an offer of reemployment from Union Carbide?
>
> "A. That's because he was too sick."

III. THE FAILURE TO APPLY OF THE CONTINUING VIOLATION DOCTRINE WARRANTS REVIEW

Respondents contend that the continuing violation doctrine does not bring the age discrimination claim out from under the applicable time bar so as to make back pay damages available under the ADEA. (Opp. Br. pp. 15-17)

The flaw in respondents' contention, however, is that the discussion in their own brief also makes it clear that the applicability of the continuing violation doctrine turns on disputed fact issues. Summary judgment as to those issues under the ADEA therefore was incorrect as a matter of law. (Opp. Br. p. 15)

This Court's review of the issue is of particular importance since this is a case in which the jury later found that age discrimination actually had occurred. Since the existence of age discrimination was found to exist (Pet. 47a), the further issue of just when the chain of similar discriminatory acts had in fact commenced for the purpose of the time bar also should have been submitted to the jury.

All three of the cases cited in respondents' brief at page 17 hold that it was reversible error for the district court to exclude evidence of prior discriminatory acts on the basis that they were time-barred, and therefore support petitioner.

Particularly noteworthy in that regard is Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998), which reversed summary judgment on those grounds, as did Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989), because of the disputed fact issues to which such a motion gave rise.

Since the decision of the courts below is inconsistent with contrary decisions from the Third, Fifth and Ninth Circuits cited

by respondents (Opp. Br. p. 17), review by this Court is of great importance because the disregard of such disputed fact issues by the courts below resulted in the elimination of any remedy whatsoever under the ADEA.

IV. DISMISSAL OF THE ERISA CLAIM IS CONTRARY TO HAZEN PAPER CASE

Respondents' brief is silent concerning the inconsistency of the ruling with this Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S.Ct. 1701 (1993), relied upon by petitioner in support of his claim under Section 510 of ERISA. (29 U.S.C. § 1140)

Respondents' brief not only ignores the significance of Hazen Paper Co., supra, but exacerbates such disregard by erroneously citing another Second Circuit case, Dister v. Continental Group, Inc., 859 F.2d 1108, 1115 (2d Cir. 1988), in which the reason for Dister's termination was specifically found to be "legitimate and nondiscriminatory," Dister, 859 F.2d at 1115, contrary to the situation presented by the instant case. Dister therefore does not present circumstances that are even remotely analogous to the instant case in which a jury actually found age discrimination to exist in connection with Mr. Lightfoot's termination. (Pet. 46a-48a)

The relevant connection here between the attempt to use downsizing as a pretext used to conceal a discrimination-motivated termination and a concurrent corresponding motivation to use the same pretext to conceal the reduction (and ergo, cost) of pension benefits is important since Hazen Paper Co., supra, holds that the same standards apply in both ERISA and ADEA cases.

As the jury found in the instant case, the downsizing program was a pretext for unlawful discriminatory conduct. The mendacity on the part of Union Carbide, as established by the jury's verdict, therefore made incorrect as a matter of law the use of summary judgment to dismiss Mr. Lightfoot's ERISA discrimination claim as well as his ADEA claim. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S.Ct 2742, 2749 (1993).[1]

Such a situation was of sufficient concern to cause certiorari to be granted in Hazen Paper Co. v. Biggins, supra, 507 U.S. at 608. The present case therefore presents an a fortiorari situation for the granting of the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." (Emphasis added.)